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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2066

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, *et al.*,

Petitioners,

v.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

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PRELIMINARY COMMENT

Petitioners request the Court to take note of the fact that the Respondents' Memorandum in Opposition to granting certiorari was filed 55 days beyond the time

allowed under Rule 24, and no request for a time extension was presented to the Court.

REPLY TO ARGUMENT

Respondents' argument in opposition to certiorari here is inconsistent and illogical. Their Memorandum admits the conflict, on an identical question of law, between the decision of the court below and the decision of the Third Circuit in *Morton v. Delta Mining Company* 495 F.2d 38, but argues that there is no occasion for this court to review the decision of the court below because it involves civil penalty assessment procedures which are no longer in effect.

In the very next sentence respondents' Memorandum notes that the same assessment procedures were involved in *Delta Mining*, and that respondents are themselves seeking certiorari in that case because "it directly affects the Secretary's ability to enforce thousands of assessment orders issued under the old procedures."[1] Respondents thus contradict their own contention that the old assessment procedures no longer have force or effect, since they still intend to seek enforcement of thousands of penalty assessments issued under such procedures.

The question petitioners here are seeking to have resolved is whether, contrary to the express holding of the district court below, the Secretary can assess

[1] Respondents' Memorandum, p. 4. The Secretary's Petition for Certiorari in *Delta Mining* was filed on November 1, 1974; No. 74-521.

penalties without making factual findings respecting the occurrence of a violation and the application of the six statutory criteria for determining the amount of the penalty.

In this case the District Court for the District of Columbia held that the language of Section 109(a) of the Federal Coal Mine Health and Safety Act "absolutely requires" that in all cases before an assessment order can become final the Secretary must (1) meaningfully consider the six statutory criteria for penalty assessment, (2) make express determinations with regard to the amount of the penalty which is warranted, and (3) make findings that a violation did occur. The Court concluded that "To allow the simple forms now employed for this purpose to suffice would be to make a mockery of the express statutory language requiring a 'decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted.' "[2]

This ruling was followed in three other district court cases in which the Secretary sought enforcement of penalties assessed under the Part 100 procedures.[3] Thus, to date four district court decisions, and a circuit court decision, *Delta Mining, supra,* have held that the statute requires factual findings to support the penalty assessments of the Secretary. The lone decision to the contrary is that of the court below.

[2] 357 F.Supp. 509, 512. See Appendix B, p. 10.

[3] *Morton v. GMW Coal Co.; Morton v. Delta Mining Co.; Morton v. Mears et al.* The district court decisions in these cases were consolidated and affirmed by the Third Circuit in *Morton v. Delta Mining Co., supra.*

It goes without saying that it is in the interest of judicial economy, and avoidance of a multiplicity of suits, to have this question finally decided by this Court rather than have it litigated in separate cases in various district and circuit courts throughout the country.

The issue of whether the statute requires the Secretary to make factual findings in all penalty assessment cases is presented in its broadest scope in this case. The decision of the district court below was based on an extensive record which included testimony of Interior Department officials and tabulations of penalties assessed in hundreds of assessment cases processed under the Secretary's summary procedures.

It would appear that by seeking certiorari in *Delta Mining Co.* and opposing certiorari herein, the Secretary seeks to avoid direct confrontation on the whole issue since the decision in *Delta* was limited to the facts of the enforcement actions there consolidated, and a decision by this Court therein would not in any way put the problem to rest with respect to cases which are factually distinguishable. In *Delta,* one factual distinction was that each mine operator had lodged a protest against the penalty assessment, whereas in the present case the district court held that it is the Secretary's responsibility to see that the statutory requirements are complied with in all cases even though the mine operator does nothing.

In their Memorandum (p. 4, fn. 6) respondents make the frivolous contention that the decision of the court below cannot affect penalty enforcement cases in other jurisdictions "since there are no coal mines in the District of Columbia." The fact that there are no coal mines in the District of Columbia has nothing to do

with the question of whether the Secretary is utilizing illegal assessment procedures. Moreover, since the Secretary maintains his headquarters in the District of Columbia, and regulations issued by him there affect coal mines throughout the entire Nation, a ruling by the Court of Appeals for the District of Columbia Circuit on the question of legality of his procedural regulations is at least of equal weight with a decision of any other circuit. Interestingly, the Secretary himself cited the decision below as authority in the *Delta Mining* case.

The Secretary acknowledges that there is a disagreement among the Circuits regarding the validity of his assessment procedures, and that this uncertainty should be resolved. Petitioners submit that this case is the proper case in which to resolve that uncertainty.

Respectfully submitted,

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